Preparatory Committee for the 1995 Conference
of the Parties to the Treaty
on the Non-Proliferation of Nuclear Weapons

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# LETTER DATED 15 SEPTEMBER 1994 FROM THE HEAD OF THE GERMAN DELEGATION, PRESIDENCY OF THE EUROPEAN UNION, ADDRESSED TO THE CHAIRMAN OF THE PREPARATORY COMMITTEE FOR THE 1995 CONFERENCE OF THE PARTIES TO THE TREATY ON THE NON-PROLIFERATION OF NUCLEAR WEAPONS, TRANSMITTING A DOCUMENT OF THE EUROPEAN UNION ON LEGAL ASPECTS IN CONNECTION WITH THE EXTENSION OF THE NPT

On behalf of the European Union I have the honour to submit to you a document covering legal aspects in connection with the extension of the NPT.

I would appreciate if you could include it as an official document of the Preparatory Committee meeting, and at the same time make it available to all NPT States Parties.

(Signed) Wolfgang Hoffmann
Ambassador
Head of the German Delegation
Presidency of the European Union

ANNEX

EUROPEAN UNION (EU)

**NPT EXTENSION OPTIONS AND MODALITIES**

1. The EU has produced this paper on the question of NPT extension options and modalities in order to facilitate further discussion of these matters among all Parties.

EXTENSION OPTIONS

The Basic Extension Options

2. Article X.2 of the Treaty (copy at A for ease of reference) means that at the Extension Conference in 1995 the parties can only choose between three basic options:

- indefinite extension

- extension for an additional fixed period

- extension for additional fixed periods.

3. The option of extension for additional fixed periods only makes sense if it is accompanied by some decision-making mechanism enabling the parties to decide at the end of each fixed period whether to move on to the next one. Without such a mechanism extension for an unlimited number of additional fixed periods would equate to indefinite extension. Similarly, without such a mechanism extension for a limited number of additional fixed periods would equate to extension for one additional fixed period.

Implications of Indefinite Extension

4. If the parties choose indefinite extension, no further decision on extension need ever be taken by them. Each of them would, however, still retain the right of individual withdrawal from the Treaty in accordance with Article X.1 of

the Treaty (copy at B for ease of reference). In addition, the fact that the Extension Conference had decided to extend the Treaty indefinitely would not mean that it could never be terminated. This could still be done in accordance with the customary international law which is reflected in Article 54 of the Vienna Convention on the Law of Treaties, VCLT (copy at C for ease of reference, and see paragraph 9 below).

Implications of Extension for an Additional Fixed Period

5. If the parties choose extension for a single fixed period, they can set the fixed period at any length they wish. Whatever length they choose, however, the Treaty will automatically terminate at the end of the chosen period. Article X.2 provides separately for the possibility of a series of additional fixed periods. Therefore if the parties opt in 1995 for extension by a single fixed period they could not still decide on a further extension at a subsequent date by the majority specified in Article X.2. That Article only gives authority for the holding of one Extension Conference with decisions taken by the majority of states parties, and a Treaty amendment would be required to enable a second one to take place. The terms of Article VIII.1 and 2 make any amendment to the NPT very difficult to achieve. In the absence of such an amendment a decision to extend the Treaty further could only be taken by all the States Parties.

Implications of Extension for Additional Fixed Periods

6. If the parties choose extension for additional fixed periods, they will need to decide on the length of these periods. Article X.2 offers no guidance on their possible length. It must therefore be assumed that they could be of any length, and that they could be of the same or varying length. As noted in paragraph 3 above, the parties would also need to agree on the mechanism by which they would

decide at the end of each fixed period whether to proceed to the next one. One possibility, which would be consistent with the need for a decision-making mechanism, yet would avoid the danger of unauthorised treaty amendment, might be a mechanism that would provide for automatic movement from one extension period to the next unless a specified number of countries objected in some prescribed manner.

7. Since the establishment of a mechanism for moving from one period to the next is not explicitly stated in the Treaty, and since such a mechanism would be exceptional (binding parties even if they vote against) any such mechanism should be confined to the minimum necessary to make sense of the Treaty provision, ie a mechanism whereby the parties vote to continue (or not). Anything which goes beyond necessary implication is an amendment to the Treaty requiring the exercise of the Article VIII mechanism.

An Additional Extension Conference?

8. The Treaty mentions only one extension conference. The idea that extension for a fixed period could also include a further conference option to consider extending the Treaty further is problematic since this would not then be an extension for "an additional fixed period". It would really be more than one period; or if it is one period, the period is not fixed. But in any event, for the reasons given in paragraph 7, such a conference should not be implied without clear wording. This is because such a conference is exceptional as it has the power to bind all parties by a majority vote. In the absence of clear wording, only one such conference can be held, and to impose another is really a Treaty amendment.

Immediate Termination

9. Article 42.2 of the VCLT (copy at D) provides that:

"termination of a treaty ... may take place only as a result of the application of the provisions of the treaty or of the present Convention". There is no provision in the NPT dealing with termination (as opposed to Article X.2 which deals with extension). The terms of Article 54 of the VCLT mean that immediate termination could only be achieved if all the parties consented to it.

EXTENSION MODALITIES

The Extension Decision

10. Article X.2 says quite clearly that the decision on extension must be taken "by a majority of parties to the Treaty" (ie not just by a majority of those attending the Extension Conference). There is therefore no legal requirement for a consensus decision on extension. Equally, there is no bar to a consensus decision on extension providing that at least a majority of states parties participate in the consensus.

11. Article X.2 says nothing about the precise procedure for taking the extension decision, about how it should be recorded, or about what should be done if there is no majority at the Conference for any decision on extension. It will therefore be necessary for the Extension Conference to have Rules of Procedure which clearly explain how these matter are to be handled within the context of Article X.2's stipulation that any decision on extension must be supported by a majority of states parties.

Rules of Procedure

12. The Rules of Procedure used at NPT Review Conferences in the past are inadequate for these purposes in a number of ways:

- it would be possible under these Rules for a decision on

extension by consensus or voting to be taken without the support of a majority of parties;

- there is no provision in these Rules that would enable one to check that a consensus decision on extension included a majority of parties;

- there is no provision in the Rules to explain what should be done if the Extension Conference is incapable of reaching a decision on extension in accordance with Article X.2.

Changes to the Rules of Procedure used at the NPT Review Conferences are under discussion at the Prepcoms with a view to making them suitable for the Extension Conference in 1995.

Recording the Extension Decision

13. The Extension Document should:

- be distinct from any Review Document;

- limit itself to a bald statement of the essential facts about which of the extension options set out in Article X.2 the Parties have chosen;

- record clearly which states participated in the consensus decision or how they voted, if a vote is taken (there will then be no room for doubt that a majority of states parties participated in the consensus decision, or voted for the decision, or about which states they were).

Immediate Entry into Force of the Extension Decision

14. Once an extension decision has been made in accordance with Article X.2, it immediately binds all the parties, even those which did not support it. It could not be legitimately argued that any extension decision must subsequently be approved or ratifed by States Parties before it comes into

force for them. There is no such requirement in Article X.2, in contrast with the ratification requirements in Article VIII.2 for amendments to the Treaty.

15. Nor could any State Party which did not support the extension decision legitimately seek to exercise its individual right of withdrawal from the Treaty as a result of the decision. It cannot be argued that an extension decision taken in accordance with the Treaty is an "extraordinary event".

Continuation in Force of the Treaty if No Extension Decision is Reached

16. There can be no argument that the Treaty cannot last longer that 25 years in the absence of a decision, since Article X.2 provides for the decision to be made at a Conference twenty-five years after the Treaty's entry into force, and for the Conference to decide to continue the Treaty's duration. It is therefore also implicit that the Treaty must continue in force while the Conference is in session.

17. As detailed in paragraphs 2-8 above, Article X (2) of the Treaty envisages only three extension options. Until the extension conference has taken a decision in favour of one of these options the Parties will not have fulfilled their obligations under this part of the Treaty. Accordingly, the Conference must remain in existence until such a decision is taken. If taking a decision by the requisite majority proves difficult, the Conference could be adjourned to reconvene later, but it cannot be concluded.

18. There is an argument that the Treaty will be terminated if the Conference fails to reach a decision on extension. This argument is difficult to sustain, since it would in effect amount to a right of termination which is not provided for in the Treaty. It would be erroneous to try to equate the absence of an extension decision with a unanimous decision to terminate it under Article 54 of the VCLT (see para 9 above). But in any case the argument should be a hypothetical one for the reasons set out in the preceding paragraph.

## ARTICLE X.2 OF THE NPT

Twenty-five years after the entry into force of the Treaty, a conference shall be convened to decide whether the Treaty shall continue in force indefinitely, or shall be extended for an additional fixed period or periods. This decision shall be taken by a majority of the Parties to the Treaty.

## - ARTICLE X.1 OF THE NPT

Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other Parties to the Treaty and to the United Nations Security Council three months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests.

## ARTICLE 54 OF THE VCLT

The termination of a treaty or the withdrawal of a party may take place:

(a) in conformity with the provisions of the treaty; or

(b) at any time by consent of all the parties after consultation with the other contracting States.

## ARTICLE 42.2 OF THE VCLT

The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty.